DR JOHN REGINALD BENEDICT & ORS A

v.

DR RAVINDRAN MENON & ORS

COURT OF APPEAL, PUTRAJAYA B
ABDUL WAHAB PATAIL JCA
CLEMENT SKINNER JCA
AZIAH ALI JCA
[CIVIL APPEALS NO: W-02(IM)-693-03-2012 (NO 74)
& W-02(IM)-698-03-2012 (NO 86)] C
29 JUNE 2012

CIVIL PROCEDURE: *Appeal - Appeal against decision of Judicial Commissioner - JC issued direction and order as to witness statement - Oral testimony - Exclusion of - Whether JC had deliberately excluded oral evidence - Whether application to set aside order for witness statements should be reinstated - Whether appeals wholly without merit* D

WORDS & PHRASES: *"unless otherwise ordered by the court" - Rules of the High Court 1980, O. 35A r. 1 - Interpretation of* E

Initially, the appellants of this case had objected to the 25 July 2011 direction by the learned Judicial Commissioner ('JC') of the High Court to prepare and submit witness statements in preparation for trial. After the order was made with regard to the witness statements ('the order'), the appellants had applied to set F aside the order and also appealed to the Court of Appeal. However, on 4 January 2012, the Court of Appeal dismissed the appellants' appeal and ordered that the parties be at liberty to apply to the High Court. Dissatisfied, the appellants appealed to the Federal Court for leave to appeal. The appellants continued G their 'campaign' to the High Court, which culminated in these two appeals against the decisions of the learned JC. The first appeal concerned the dismissal of the appellants' application to reinstate their application to set aside the order, whereas the second pertained to the dismissal of a separate application to vary, set H aside and review the said order. The appellants' counsel submitted, *inter alia*, that the JC, by the order, had intended to exclude oral evidence adduced during examination in chief, and in doing so would have contravened O. 38 r. 1 of the Rules of the High Court 1980 and the Evidence Act 1950 which required oral I

A evidence to be tendered. The crux of the appeal, in any case, revolved around the express provisions of O. 35A of the Rules of the High Court 1980 and the order by the learned JC for parties to prepare and submit witness statements.

B **Held (dismissing the appeals)**
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) Both rr. 1 and 2 of O. 35A are qualified by the words 'unless otherwise ordered by the court'. Therefore it is for the parties C to submit why it should or should not be so ordered, to enable the trial judge, before whom are the pleadings and upon whose shoulders rest the direct and primary jurisdiction and responsibility for a fair and just decision, to exercise her judicial discretion as to the qualifications to the general rule in D rr. 1 and 2 to be applied in a particular case. Given the use of the word 'shall' in rr. 1 and 2, the qualification to the general rule may be granted only upon good reason. (para 23)

(2) The interpretation of O. 35A is a question of mindset. It E should start with compliance, and then go on to explain which parts of a witness's testimony cannot, in the particular case, be given in a witness statement. It maintains the proper perspective. It places the reasons in the best possible light for consideration in the judicial exercise of the court's discretion. F (para 39)

(3) The submission that 'Her Ladyship had clearly intended that oral evidence during examination-in-chief of certain witnesses be excluded" capping the submissions for appellants show the G submissions to be a hyperbolic construct. There is no basis for the accusation. The trial had not begun and the JC had not excluded oral testimony. The appeals were wholly without merit. (para 39)

H ***Bahasa Malaysia*** *Translation Of Headnotes*

Pada awalnya, perayu-perayu dalam kes ini telah membantah arahan bertarikh 25 Julai yang diberikan oleh yang arif Pesuruhjaya Kehakiman ('PK') Mahkamah Tinggi untuk menyediakan dan mengemukakan penyata saksi-saksi untuk persediaan perbicaraan. I Selepas perintah berkenaan dengan penyata saksi-saksi ('perintah

tersebut') dibuat, perayu-perayu telah memohon untuk mengenepikan perintah tersebut dan merayu ke Mahkamah Rayuan. Walau bagaimanapun, pada 4 Januari 2012, Mahkamah Rayuan telah menolak rayuan perayu-perayu dan memerintahkan bahawa pihak-pihak mempunyai kebebasan untuk membuat permohonan ke Mahkamah Tinggi. Tidak berpuas hati, perayu-perayu telah membuat permohonan ke Mahkamah Persekutuan untuk kebenaran membuat rayuan. Perayu-perayu telah meneruskan 'kempen' mereka di Mahkamah Tinggi yang berakhir dengan dua rayuan di sini terhadap keputusan-keputusan yang arif PK. Rayuan pertama adalah berkenaan penolakan permohonan perayu-perayu untuk menghidupkan permohonan mereka untuk mengenepikan perintah, manakala rayuan kedua adalah berkaitan penolakan permohonan berasingan mereka untuk mengubah, mengenepikan dan menyemak perintah tersebut. Peguam perayu-perayu telah berhujah, antara lain, bahawa yang arif PK, melalui perintahnya, berhasrat untuk mengenepikan keterangan lisan yang diberikan semasa pemeriksaan utama, yang mana ia adalah bertentangan dengan A. 38 k. 1 Kaedah-kaedah Mahkamah Tinggi 1980 dan Akta Keterangan 1950 yang menghendaki pengemukaan keterangan lisan. Teras kes ini bagaimanapun berkisar di sekitar peruntukan ekspres A. 35A Kaedah-kaedah Mahkamah Tinggi 1980 dan perintah yang dikeluarkan oleh yang arif PK supaya pihak-pihak menyediakan dan mengemukakan penyata saksi-saksi.

Diputuskan (menolak rayuan-rayuan)
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Kedua-dua k. 1 dan 2 A. 35A adalah tertakluk kepada kata-kata 'melainkan diperintahkan sebaliknya oleh mahkamah'. Oleh itu, ianya di atas pihak-pihak untuk mengemukakan kenapa ia patut atau tidak patut diperintahkan sedemikian, bagi membolehkan hakim bicara, di hadapan siapa rayuan berada dan atas siapa terletaknya bidang kuasa serta tanggungjawab utama dan langsung untuk memberi satu keputusan yang adil dan saksama, dalam melaksanakan budi bicara kehakiman, tentang syarat-syarat kepada kaedah am kk. 1 dan 2 yang digunapakai di dalam kes-kes tertentu. Berdasarkan penggunaan perkataan 'hendaklah' di dalam kk. 1 dan 2, syarat-syarat kepada kaedah am boleh dibenarkan hanya berdasarkan sebab-sebab yang betul.

(2) Tafsiran A. 35A adalah suatu persoalan minda. Ia harus bermula dengan pematuhan dan kemudiannya menerangkan bahagian-bahagian keterangan saksi yang dalam sesuatu kes, tidak boleh dikemukakan di dalam satu penyata saksi. Ia mengekalkan perspektif yang sewajarnya. Ia menyediakan sebab-sebab dengan cara yang sesuai untuk pertimbangan kehakiman atas budi bicara mahkamah.

(3) Pengataan 'yang arif hakim bermaksud supaya keterangan lisan semasa pemeriksaan utama diketepikan' yang mengakhiri penghujahan perayu-perayu menunjukkan bahawa hujah tersebut adalah bersifat hiperbola. Tiada asas untuk membuat tuduhan ini. Perbicaraan masih belum dimulakan dan PK belum pernah mengenepikan keterangan lisan. Maka rayuan-rayuan keseluruhannya adalah tidak bermerit.

Case(s) referred to:

AlliedBank (Malaysia) Bhd v. Yau Jiok Hua [1998] 2 CLJ 33 HC ***(refd)***

Arlidge v. Mayor etc. of Islington [1909] 2 KB 127 ***(refd)***

Barnard & Others v. National Dock Labour Board & Another [1953] 1 All ER 1113 ***(refd)***

Basil Anthony Herman v. Premier Security Co-operative Ltd and Others [2010] 3 SLR 110 ***(refd)***

Choy Ching Wan v. Land Development Specialist Sdn Bhd & Anor [2007] 7 CLJ 393 HC ***(refd)***

Dato Gopal Sri Ram v. Dato Vijaya Kumar & Ors [2006] 6 MLJ 328 ***(refd)***

Dato' Mohd Tahir Abdul Rahim & Ors v. Sykt Permodalan Kebangsaan Bhd & Ors [1991] 2 CLJ 1155; [1991] 2 CLJ (Rep) 525 HC ***(refd)***

David Tan Boon Chee v. Medical Council of Singapore [1980] 1 LNS 16 HC ***(refd)***

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal [2009] 4 CLJ 329 FC ***(refd)***

Edward Wong Finance Co Ltd v. Johnson Stokes & Master [1984] AC 296 ***(refd)***

Far East Food Industries Sdn Bhd v. PT Anekapangan Dwitama [1997] 4 CLJ 127 CA ***(refd)***

Faridah Ariffin v. Dr Lee Hock Bee & Anor [2006] 1 CLJ 660 HC ***(refd)***

Fulker v. Fulker [1936] 3 All ER 636 ***(refd)***

Oh Keng Seng v. PP [1975] 1 LNS 114 HC ***(refd)***

Powell v. May [1946] 1 KB 330 ***(refd)***

R v. Lord Chancellor ex parte Witham [1998] QB 575 ***(refd)***

Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2002] 2 CLJ 697 CA ***(refd)***

Tan Kah Khiam v. Liew Chin Chuan & Anor [2006] 4 CLJ 715 CA ***(refd)***
Tay Tong Chew & Anor v. Abu Rahman Hj Ahmad [1984] 2 CLJ 227; [1984] 1 CLJ (Rep) 389 FC ***(refd)***
Teh Cheng Poh v. PP [1978] 1 LNS 202 PC ***(refd)***
UMBC Finance Ltd v. Robin Woon Kim Yan [1991] 1 CLJ 40; [1991] 1 CLJ (Rep) 471 SC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 15(1), 16(g), 17(4), (5)
Evidence Act 1950, ss. 3, 16, 73A, 159(1)
Income Tax Act 1967, s. 154(2)
Interpretation Acts 1948 and 1967, s. 23
Rules of the High Court 1980, O. 1A, O. 28 rr. 4(3), 8, O. 35 r. 4(3), (4), (5), O. 35A, O. 38 rr. 1, 2, O. 92 r. 4
Subordinate Courts Rules Act 1955, s. 8

Rules of the Supreme Court 1965 [UK], O. 38A r. 2A

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 17 para 29; vol 37 para 452
The Malaysian High Court Practice 2003 Desk edition, para 38.2.2
The Supreme Court Practice 1997, vol 1, para 38/2A/11

For the appellants - PS Ranjan (MS Dhillon & KB Karthi with him); M/s PS Ranjan & Co
For the 1st & 3rd respondents - Darryl SC Goon (Maidzuara Mohammed & Tham Li Vyen with him); M/s Raja, Darryl & Loh
For the 2nd respondent - Nga Mei Yen; M/s Puthucheary
For the 4th respondent - T Tharumarajah; M/s Azim Tunku Farik & Wong

Reported by Baizura Abd Razak

JUDGMENT

Abdul Wahab Patail JCA:

[1] In the course of the submissions before us, the comment was made that the grounds of decision of the High Court of less than a hundred words is not a speaking judgment and the Court of Appeal did not give reasons, not even broad grounds in an earlier appeal in this case. We said we would provide grounds. In these grounds, before proceeding to our observations and thereafter our reasoning leading to our conclusion and decision, we

think it necessary to set out at some length the submissions for the appellants. It is for the sake of convenience and so as to appreciate the subject matter and the appeal on a true perspective. In the 11th paragraph of these grounds we begin with our observations, reasoning, conclusions and decision.

The Submissions

[2] In his outline of submissions, P.S. Ranjan, counsel for the Appellants, introduced his submissions as follows:

> The use of witness statements is widespread but unlawful. It is against the will of Parliament and fundamental common law principles regarding a fair trial.

[3] His summary of submissions began as follows:

> 1. The use of witness statements is unlawful. It is against the will of Parliament and fundamental common law principles of a fair trial. It deprives the High Court of jurisdiction or power. There is widespread misconduct in the preparation of witness statements. The Court should not wait for nullities and misconduct to occur before intervening in an appeal after trial.
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> 2. The learned Judicial Commissioner had called up the case for mediation and, without notice, without power, and without jurisdiction, taken counsel by surprise by undertaking case management, and fixed the trial before herself and, over counsel's objection, ordered the delivery of witness statements. A judicial function and a mediation function must be kept separate from each other. Her Ladyship had clearly intended that oral evidence during examination in chief of certain witnesses be excluded. Contrary to the express provisions of O. 38 r. 1 of the Rules of the High Court 1980 and the Evidence Act 1950 which require oral evidence to be tendered.

[4] His submissions continued, raising issues concerning, and we quote:

(i) The administration of justice, especially the need to maintain public confidence by the courts acting within jurisdiction and their powers, and following the requirements of a fair trial, which trial must be conducted orally and in public;

(ii) The conduct of lawyers in the administration of justice;

(iii) The failure twice to lay before Parliament within the required time or at all O. 35A of the Rules of the High Court 1980 in its original form and its amended form;

(iv) The absence of enabling parliamentary legislation allowing the use of witness statements;

(v) The absence of statutory provisions compelling witnesses, upon pain of punishment for non-compliance, to give witness statements out of court to litigants and their lawyers;

(vi) The conflict between O. 35A (which provides for witness statements) and other provisions of the same Rules and also the Evidence Act 1950 (which provide for oral evidence);

(vii) The failure of the High Court and the Court of Appeal to follow a relevant binding judgment of the Court of Appeal;

(viii) The need for safeguards to be introduced if witness statements may lawfully be used; and

(ix) The urgent need for review of the law of evidence in the absence of enabling parliamentary legislation regarding witness statements and in the presence of conflicting statutory provisions, and the legal position in countries like Britain and Singapore regarding oral evidence.

[5] Along the way, the submissions were peppered with the following, which we reproduce from the summary of submissions, with additions from the outline of submissions where necessary:

(i) The taking of evidence is a judicial function. It is not the function of counsel. In *Far East Food Industries Sdn Bhd v. PT Anekapangan Dwitama* [1997] 4 CLJ 127 CA, the Court of Appeal said (at p 134) as follows:

> ... a judge cannot, under any circumstance, delegate any of his judicial functions to anybody for any reason whatsoever ....

(ii) In *Tan Kah Khiam v. Liew Chin Chuan & Anor* [2006] 4 CLJ 715 CA, the Court of Appeal ordered a re-trial because the learned trial Judge had not followed a rule of evidence.

(iii) In *Basil Anthony Herman v. Premier Security Co-operative Ltd and Others* [2010] 3 SLR 110, the Court of Appeal of Singapore ordered a re-trial because the High Court had refused to allow the oral evidence during examination in chief of certain witnesses to be tendered.

(iv) There is misunderstanding in Malaysia about the use of witness statements in Britain. In Britain, copies of witness statements are served on the other parties but not filed in court, a basic safeguard. In Britain, the trial remains an "oral, public hearing" and "the written statement of a witness is not in itself evidence of the case." Witness statements which have been exchanged … are not put in evidence by the fact of exchange. (see: *The Supreme Court Practice 1997*, vol. 1 para 38/2A/11). So, in Britain, the trial remains an "oral, public hearing" and "the written statement of a witness is not in itself evidence of the case."

(v) In Britain, O. 38A r. 2A of the Rules of the Supreme Court 1965 introduced the requirement for service of "written statements of the **oral evidence** which the party intends to adduce (emphasis added)." Therefore, witness statements are not "oral evidence." (see: *The Supreme Court Practice 1997*, para 38/2A)

(vi) The Evidence Act prevails over O. 35A of the Malaysian Rules. The making of O. 35A amounts to interference with a litigant's fundamental right, in fact, duty, to bring oral evidence. That right was recently recognised in *Basil Anthony Herman* by the Court of Appeal of Singapore where affidavits of evidence in chief have been used. O 35A also cannot stand in the presence of other provisions of the Malaysian Rules, including:

(a) O. 28 rr. 4(3) & 8;

(b) O. 35 r 4(3), (4) & (5);

(c) O. 38 r 1.

(d) 38. By making O. 35A, the Rules Committee has gone against the will of Parliament as expressed in the Evidence Act. In *Powell v. May* [1946] 1 KB 330, a local authority purported to modify an Act of Parliament by making a by law forbidding betting in public places altogether whereas the Act of Parliament applicable allowed it under certain conditions. The by law was struck down by the court.

(vii) There is widespread misconduct in the preparation of witness statements. Taking witness statements in question and answer form (and not in narrative form, like in Britain), amounts to coaching of witnesses and rehearsing of their evidence.

(a) 18. It is an open secret that lawyers often prepare both the questions and the answers in witness statements. Such conduct amounts to professional misconduct, contempt of court, and criminal offences. Witness statements are also being used as substitutes for oral cross-examination and re-examination. Court interpreters are also taking evidence in Bar rooms in the absence of judges and magistrates.

(b) 20. There was a witness of Messrs Raja Darryl & Loh, who asked, "Which version?" when asked as to when his witness statement was prepared. Only one version was tendered. Obviously he had been coached and had rehearsed his evidence.

(c) 21. There was a lawyer who gave evidence along with his client in the Shah Alam High Court. Their respective witness statements contained identical answers to identical questions. A judge of the High Court recently said in open court that a witness confessed to seeing his witness statement for the first time only in court. The lawyers concerned should have been sent to prison.

(d) 25. If a lawyer or his or her clerk or pupil records the questions and answers of his witness in a witness statement, then that lawyer and/or his or her clerk or pupil will have to sign it and testify in court as one of the makers of and also as the recorder of the statement. As a result the lawyer and his or her law firm will not be able to act further in the case concerned.

(e) 26. The actual words uttered by the witness or a properly-qualified and sworn interpreter regarding the witness's evidence must be recorded. When lawyers take evidence (and purported to be interpreters as well), do they record the actual words?

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(f) 27. In *Dato' Mohd Tahir Abdul Rahim & Ors v. Sykt Permodalan Kebangsaan Bhd & Ors* [1991] 2 CLJ 1155; [1991] 2 CLJ (Rep) 525 VC George J (as his Lordship then was) had condemned an agreement that was "... most artfully framed to conceal the true nature of the

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transaction ...". The agreement was prepared out of the sight and hearing of the court. If lawyers can prepare misleading agreements, what more false and misleading witness statements?

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(viii) O. 38 r 1 provides (in accordance with decided cases) for "examination of the witnesses orally and in open court" (and that too "Subject to the provisions of these rules and of the Evidence Act 1950").

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(a) O. 35A Subject to the provisions of these rules and of the Evidence Act 1950, and any other written law relating to evidence, any fact required to be proved at the trial of any action begun by writ by the evidence of witnesses shall be proved by the examination of the witnesses orally and in open court.

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(b) Section 3 Evidence Act 1950:

'evidence' includes:

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(a) all Statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry: such statements are called oral evidence.

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(b) all documents produced for the inspection of the court; such documents are called documentary evidence.

(viiii) There has been non-compliance with s. 17(5) of the Courts of Judicature Act 1964 regarding laying of the amending rules

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before Parliament from 2000 onwards and again in 2011. Therefore O. 35A is void on that ground too and the High Court is therefore without jurisdiction or power to conduct trials using witness statements.

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(a) Section 17(5) of the Courts of Judicature Act 1964 provides as follows:

> (5) Rules of court shall be laid before the Dewan Rakyat at the first meeting after their publication, and may be disapproved in whole or in part by a resolution of the Dewan Rakyat.

(b) 45. There is no provision for extension of time. Laying of a rule "at the first meeting after their publication" is required before the Dewan Rakyat can exercise its power of disapproval.

(c) 46. In contrast, the Subordinate Courts Rules Act 1955 provides only for laying "as soon as possible. (See s. 8)".

(d) 47. Section 154(2) of the Income Tax Act 1967 provides no time limit at all for laying of subsidiary legislation, something even lighter.

(e) 48. By using different phraseology in various Acts, Parliament had intended different meanings and effects.

(f) 53. By not laying at all the amendment by which O. 35A of the Rules of the High Court was introduced in 2000, the Rules Committee unlawfully deprived Parliament of the power to disapprove it.

(g) 54. The amendment to O. 35A was published on 29 June 2011 (but was made retrospective in effect to 1 March 2011). It was not laid before the Dewan Rakyat the next day, on 30 June 2011, even though it had a meeting on that date. There should have been no delay in laying the amendment, especially as it was made retrospective in effect and there was provision for parliamentary disapproval.

(h) 55. The next amendment, the amendment to the (therefore) non-existent O. 35A was laid before the Dewan Rakyat only on 20 October 2011, although there were 13 meetings after 29 June 2011 and before 20 October 2011 as shown by Hansard.

A (i) 56. The Rules Committee had purported to amend a rule when Parliament had been deprived by it of the opportunity to disapprove not only the amendment made in 2000 but the amendment made in 2011.

B (x) The whole, not just part, of a witness's evidence must be given in open court in the presence of the judge, counsel, the parties, and the public. It is an injustice to allow self-interested litigants and/or their lawyers or others (like clerks and students) to take evidence on behalf of the court.

C (xi) There are numerous provisions in the Evidence Act requiring evidence to be given orally, and for the court and opposing counsel to intervene when a question is asked and before an answer is given.

D (xii) The Evidence of Child Witnesses Act 2007 (which applies to civil cases as well) shows that it is recognised that only Parliament may lawfully legislate contrary to the provisions of the Evidence Act.

E (xiii) The safeguards regarding witness statements introduced in Britain by parliamentary and delegated legislation have not been introduced in Malaysia.

(xiv) When facts are in dispute, affidavits (and certainly witness statements) cannot be used, as recognised in O. 28 rr. 4(3) F & 8 and O. 38 r 2.

(xv) The duty, if any, to give evidence arises only at trial, not before, and, in the case of defendants, only after the close of the plaintiffs' case.

G (xvi) Even pleading evidence is wrong.

(xvii) Section 73A of the Evidence Act in effect prohibits the use of a witness statement "made by a person interested at a time when proceedings were pending or anticipated". H

(xviii) The decided cases show that interpreters must be independent. The litigants and their lawyers must not be interpreters when taking witness statements.

I (xix) There is also widespread abuse of witness statements by way of amendment, improvement, etc. in court.

(a) 67. A widespread practice is not necessarily a proper practice. In *Edward Wong Finance Co Ltd v. Johnson Stokes & Master* [1984] AC 296, the Privy Council held to be negligent the conduct of solicitors who followed a certain speedy and widespread conveyancing practice in Hong Kong, which was "highly praised by lawyers and their clients", but without following simple safeguards. Witness statements have been praised by some judges and lawyers in Malaysia even though the safeguards in the Evidence Act and the rules of honourable advocacy have been ignored.

(b) 68. It would certainly be a case of the tail trying to wag the dog to allow the Rules Committee to make rules which are *ultra vires* parliamentary legislation; which are contrary to basic principles of justice and rules of honourable advocacy; and which take away the powers of judges to decide in the course of a trial regarding such matters as the competence of witnesses, the relevance and admissibility of answers to questions. Leading, indecent, scandalous, insulting and annoying questions, and rules which prevent judges from observing the demeanour of witnesses during examination-in-chief.

(c) 69. Subsidiary legislation which is inconsistent with an Act of Parliament is void to the extent of the inconsistency. See: s. 23 of the Interpretation Acts 1948 and 1967.

(xx) The use of witness statements is an improper mode of refreshing memory and is contrary to s. 159 of the Evidence Act.

(xxi) The use of witness statements leads to judges not being sufficiently engaged in the proceedings, sometimes intervening too late, and after the damage has been done.

(xxii) If witness statements are used, an appellate court must be more willing than otherwise to disturb findings of fact made by the trial court. The appellate courts have often ordered, in cases where affidavits were used, re-trials with oral evidence to be tendered. The same point must apply to witness statements.

A (xxiii) Witnesses do not merely speak or write. They often have to demonstrate an action, indicate size, shape, length, etc., something not possible when witness statements are used. They may have to testify at the scene of an incident.

B (xxiv) It may be convenient to use witness statements but, as said by Lord Atkins, convenience and justice are often not on speaking terms.

[6] The outline submissions were presented under headings as follows:

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(i) Introduction.

(ii) O. 35A is *ultra vires* the Evidence Act 1950.

D (a) 17. A litigant has the right, in fact the duty, to tender evidence according to the Evidence Act and fundamental rules of common law, and not according to void delegated legislation. If O. 35A is to prevail, it would render meaningless many provisions of the Evidence Act.

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(iii) Unlawful practice (see above).

(iv) The duty of the court to take oral evidence (see above):

F (a) *Fulker v. Fulker* [1936] 3 All ER 636:

(b) *Sarkar on Evidence* (15th edn), 1033: "By oral evidence is meant the testimony of living persons examined in the presence of the court or commissioners appointed by the court ..."

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(v) Against the Will of Parliament (see above).

(vi) Interference with Access to Justice:

H (a) 39. The learned Judicial Commissioner's decisions are unlawful interference with a litigant's right of access to justice. In *R v Lord Chancellor ex parte Witham* [1998] QB 575 the court struck down the Lord Chancellor's order repealing a regulation by which certain classes of persons were exempted from paying court fees and by which the Lord Chancellor may waive fees in other

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cases. The Lord Chancellor had unlawfully interfered with a common law right of access to the court which may be abolished only by express statutory authority, something absent in that case.

(vii) Fundamental Right to bring Oral Evidence:

(a) 40. Every litigant has a basic and fundamental right to bring all relevant evidence, a point made by the Court of Appeal of Singapore when disagreeing with the High Court's decision to exclude oral evidence during examination-in-chief and to require affidavits of evidence-in-chief.

(viii) Failure to lay amending rules before the Dewan Rakyat within time (see above).

(ix) A Widespread and Wrong Practice (see above).

(x) Interpretation leading to Injustice:

(a) 70. O. 35A is unreasonably worded. A litigant cannot compel a witness to give a witness statement yet can suffer the fate of not being able to call the witness by subpoena or otherwise to give oral evidence. A rule can be struck down for unreasonableness, unfairness or injustice. Her Ladyship had not stated how a litigant could (lawfully, that is) compel someone to give a witness statement.

(b) 71. *Arlidge v. Mayor etc. of Islington* [1909] 2 KB 127 the court struck down a by-law by which landlords were required to clean the premises concerned annually and could suffer penalties for failure to do so, even though they had no right of access to the premises.

(c) 72. *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2002] 2 CLJ 697 CA:

> A rule of court should not be interpreted in such a way as to result in unfairness or produce a manifest injustice.

A (d) 73. Witness statements lead to unfairness and manifest injustice. It is a basic principle of advocacy that a lawyer must not take an unfair advantage over an opponent. One litigant may try not to abuse the secrecy in which witness statements are taken but
B another may take unfair advantage of the secrecy and prepare false and misleading testimony. The other side and the public must be present or be allowed to be present when evidence is given. The judge too must be present.

C (xi) Courts to be "Open and Public":

(a) 74. Section 15(1) of the Courts of Judicature Act 1964 provides in the material part thereof as follows:

D (1) The place in which any court is held for the purpose of trying any cause or matter, civil or criminal, shall be deemed an open and public court to which the public generally may have access ...

E (b) The "trying" of any cause or matter includes the taking of evidence.

(xii) Injustice when there is no oral public trial:

(a) 76. A trial must be a public trial. See s. 15 of the
F Courts of Judicature Act 1964.

(b) *Halsbury's Laws of England* (4th edn), vol 37, para 452

("the evidence of witnesses must be by examination of the witnesses orally in open court, for this is a
G fundamental rule of the law of evidence which ensures that trials with witnesses will ordinarily take place in public")

(xiii) Seeing and hearing witnesses:

H (a) *Oh Keng Seng v. PP* [1975] 1 LNS 114:

There is therefore a real risk that evidence not wholly recorded by a magistrate or president but which is acted on by him may materially prejudice an accused
I person where a decision involving the credibility of a witness is based on that evidence ...

(b) *Halsbury's Laws of England* (4 edn), vol 17, para 29:

> Oral evidence given in open court by witnesses whose demeanour and deportment have been observed is preferable to evidence given by witnesses out of court ...

(c) *David Tan Boon Chee v. Medical Council of Singapore* [1980] 1 LNS 16:

> ... A person who has not seen and heard a witness is as a rule quite incapable of estimating the value of his evidence. ...

(xiv) Recording of Evidence – a Judicial Function. *Faridah Ariffin v. Dr Lee Hock Bee & Anor* [2006] 1 CLJ 660 where Abdul Malik Ishak J set aside an order for the use of witness statements which his Lordship had made; *Choy Ching Wan v. Land Development Specialist Sdn Bhd & Anor* [2007] 7 CLJ 393 where Abdul Malik Ishak J approved of the use of witnesses statements, but did not refer to *Faridah Ariffin v. Dr Lee Hock Bee & Anor (supra)*:

(a) 89. Abdul Malik J did not refer to his decision in *Faridah Ariffin*'s case in his subsequent decision in *Choy Ching Wan v. Land Development Specialist Sdn Bhd & Anor* [2007] 7 CLJ 393 in which his, Lordship apparently approved of the use of witnesses statements.

(b) 90. Not having said that he was departing from his decision in *Faridah Ariffin*'s case, his Lordship's judgment in the second case must be read subject to what was said in *Faridah Ariffin*'s case, including regarding the safeguards that are necessary before witness statements can be used. In Malaysia, there are no such safeguards, including the necessary parliamentary legislation.

(xv) No Delegation of Judicial Function:

(a) 91. The recording of evidence is a judicial function, just like the writing of a judgment is. Such function cannot be delegated to a party and his or her lawyers to be undertaken in private.

A (b) 92. O. 35A is so loosely-worded that even a law student or legal clerk can take a witness statement from a witness for use at trial.

(c) 93. *Far East Food Industries Sdn Bhd v. PT Anekapangan* B *Dwitama* [1997] 4 CLJ 127 CA "... a judge cannot, under any circumstance, delegate any of his judicial functions to anybody for whatever reason whatsoever ..."

C (d) 97. ... *Tay Tong Chew & Anor v. Abu Rahman Hj Ahmad* [1984] 2 CLJ 227; [1984] 1 CLJ (Rep) 389 in which the learned judicial commissioner had left it to counsel to assess the damages.

(e) 98. *Barnard & Others v. National Dock Labour Board &* D *Another* [1953] 1 All ER 1113 "While an administrative function can often be delegated, a judicial function rarely can be. No judicial tribunal can delegate its functions unless it is enabled to do so expressly or by necessary implication."

E (xvi) Inherent powers of court:

(a) 99. O. 92 r. 4 of the Rules of the High Court 1980 preserves the inherent powers of the court to prevent injustice. The use of witness statements. Whether in F question and answer form or not, promotes injustice.

(xvii) Relevant provisions of the Evidence Act 1950:

(a) 100. The Evidence Act contains provisions in which the G word "question" appears. All over the Act are provisions which provide for the judge and counsel to intervene when a question is asked and before an answer is given.

H (b) 101. List of sections by which it is obviously required that oral evidence be given in court.

(xviii) Special Parliamentary legislation for child witnesses.

I

(xix) Safeguards in Britain:

(a) 103. Extensive provisions were introduced in Britain to provide safeguards and so as to prevent a miscarriage of justice when witness statements are prepared or used. There are no such safeguards in Malaysia.

(b) 104. In Britain, witness statements are prepared by solicitors for the purpose of instructing counsel. When counsel is given a brief containing, amongst other documents, witness statements (also called "proofs of evidence" as said in Cordery, cited earlier), such statements should not be in question and answer form. Witness statements are meant to inform counsel of the substance of the evidence available from the witnesses. If a witness gives evidence in court which is at variance with his witness statement, he or she is said to have "not come up to proof." The English legislation, both parliamentary and subordinate, regarding witness statements serves primarily to provide discovery of what are otherwise privileged documents with a view to informing an adverse party of the substance of the evidence intended to be given. Witness statements are not a substitute for oral evidence. The judge is not shown the witness statements.

(c) 105. At trial, the judge may, after hearing counsel, allow the use of witness statements, for example, when the facts are not in dispute or where the contents of the witness statements are drawn from documentary evidence. Especially undisputed documentary evidence. Witness statements should be in narrative form. They should not be used for coaching witnesses, as they would be when prepared in question and answer form for tendering in court.

(xx) Oral evidence to be given when facts are in dispute:

(a) 106. The court may, where justice requires, order an affidavit which is already made to be read at the trial. The court cannot properly make such an order where it is clear that the evidence will be strongly contested or that the credibility of the witness is dependent on

A the court's view of the witness, or where by its very nature the evidence needs to be examined closely and its very admissibility is yet to be determined. See *The Malaysian High Court Practice* 2003 Desk edition, para 38.2.2; *UMBC Finance Ltd v. Robin Woon Kim Yan* B [1991] 1 CLJ 40; [1991] 1 CLJ (Rep) 471.

(xxi) Duty to give evidence only at trial:

(a) 108. The duty of the plaintiff to give evidence arises only at trial, not before. A defendant is not obliged to C give evidence, certainly not obliged to deliver witness statements in advance of trial. He may at the close of the plaintiff's case, at trial, elect not to give evidence.

(xxii) Even pleading evidence is wrong:

D

(a) 109. Even pleading evidence is wrong. In *Dato Gopal Sri Ram v. Dato Vijaya Kumar & Ors* [2006] 6 MLJ 328 Kang Hwee Gee J (as his Lordship then was) decided that pleading evidence could expose a litigant E to prejudgment, prejudice and probable untruth.

(xxiii) Prohibition by Evidence Act:

(a) 112. Section 73A of the Evidence Act 1950 provides in effect that a witness statement is inadmissible if it is F "made by a person interested at a time when proceedings were pending or anticipated. See *Allied Bank (Malaysia) Bhd v. Yau Jiok Hua* [1998] 2 CLJ 33; [1998] 6 MLJ 1, at pp 19-21"

G (b) 113. If there are already "pending" proceedings, the witness statements cannot be admitted under s. 73A of the Act. The section does not provide that a witness statement may stand as a witness's evidence-in-chief. It only allows, under certain conditions, statements made H out of court by a witness to be admitted as documentary evidence.

(xxiv) Interpreters:

(a) 114. Difficulties arise as regards the qualifications of I interpreters. An interpreter would have to take an oath before interpreting a witness's evidence. It would be

wrong of counsel or his or her clerk to be the interpreter. It would also be wrong to use the services of an interpreter engaged by a party. The interpreter must be engaged by the court. Where there is no oath or affirmation by a witness or an interpreter, the value of the evidence would be adversely affected.

(xxv) Abuse where evidence is recorded or a document is prepared out of the sight or hearing of the court:

(a) 115. It is a common *albeit* unlawful practice for witnesses when they come to court to purport to amend the evidence that had been recorded in their witness statements. Once evidence has been recorded in court, it cannot be altered. However, errors in and omissions from the record may be corrected in accordance with settled legal principles.

(b) 116. Witnesses may indicate that they want to change their testimony during trial. However they may then be asked to give reasons for the change in their evidence. They cannot amend their evidence by altering witness statements. It would be misconduct on the part of counsel to discuss with a witness the evidence given by the witness with a view to amending it. There has crept in the improper practice of amending witness statements with a view to improving a party's case.

(xxvi) An improper mode of refreshing memory:

(a) 117. Witness statements prepared well after the events concerned have been used as an improper mode of refreshing a witness's memory when the requirements of s. 159 of the Evidence Act have not been met. Section 159(1) provides as follows:

(1) A witness may while under examination refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory.

(xxvii) Judge must be engaged in the proceedings, not disengaged.

(xxviii) Disturbing findings of fact based wholly or partly on witness statements:

(a) 122. An appellate court must be more willing than usual to disturb findings of fact made by a trial judge based wholly or partly on witness statements. The use of witness statements would mean more work for the appellate courts and also raises the chances of retrials being ordered (it is hoped that a retrial would not include the use of witness statements again).

(xxix) Necessary measures:

(a) 122. If witness statements are to be used lawfully, the authorities should seek the making of the necessary parliamentary legislation, should consider the parliamentary and subsidiary legislation in Britain which contains various safeguards, should tighten the rules of professional conduct and discipline of lawyers, and should provide continuing professional development.

(b) 123. There are other but lawful ways of speeding up proceedings in court.

(c) 124. Importantly, excessive speeding up of proceedings would lead to the court and counsel losing track of the proceedings, like passengers in a speeding train who get a blurred view of what they see outside.

(xxx) Fundamental Breaches:

(a) 125. The breaches of the principles of justice caused by the use of witness statements as a substitute for oral evidence-in-chief are so fundamental that they cannot be waived or acquiesced in. *Tan Boon Chee*'s case

The Background: What Brought This On According To The Appellant

[7] We examined what brought forth this veritable torrent.

[8] Counsel put it this way in his summary of submissions:

(i) 2. The learned Judicial Commissioner had called up the case for mediation and, without notice, without power, and without jurisdiction, taken counsel by surprise by undertaking case management, and fixed the trial before herself and, over counsel's objection, ordered the delivery of witness statements. ... Her Ladyship had clearly intended that oral evidence during examination in chief of certain witnesses be excluded, contrary to the express provisions of O. 38 r. 1 of the Rules of the High Court 1980 and the Evidence Act 1950 which require oral evidence to be tendered.

[9] In his outline of submissions, he submitted:

(i) 2. In this case, the learned Judicial Commissioner had called up the case for mediation on 25 July 2011 and, without notice, without power, and without jurisdiction, taken counsel by surprise, undertook case management, and fixed the trial before herself and, over counsel's objection, ordered the delivery of witness statements. Both a judicial function and a mediation function had been performed by the learned Judicial Commissioner. Her Ladyship had acted contrary to O. 38 r. 1 of the Rules of the High Court 1980 and various other provisions of the Rules and also the Evidence.

(ii) 3. The appellants applied for an order for setting aside of the order made by the learned Judicial Commissioner on 25 July 2011. They also lodged an appeal to the Court of Appeal.

(iii) 4. The learned Judicial Commissioner commenced hearing arguments on the application for setting aside and then adjourned the hearing pending the disposal of the appeal. The Court of Appeal dismissed the appeal and ordered that the parties be at liberty to apply to the High Court. The appellants filed an application for leave to appeal to the Federal Court. That application is fixed for hearing on 13 August 2012.

(iv) 5. The appellants went back to the High Court. The learned Judicial Commissioner dismissed the application for reinstating the application for setting aside the order for witness statements. A separate application for varying, setting aside and reviewing the order for witness statements was dismissed

A save for an order that the original order for witness statements be varied so as to exempt the 2nd and 3rd appellants and subpoenaed witnesses from giving witness statements.

(v) 6. The only grounds of decision of the learned Judicial
B Commissioner are in regard to her original order for witness statements. It runs to less than a hundred words.

(vi) 7. The Court of Appeal has not given grounds of decision.

(vii) 8. The learned Judicial Commissioner's grounds of decision are
C not a speaking judgment. The Court of Appeal has not given a reasoned judgment, not even broad reasons. However, Messrs Raja Darryl & Loh, who act for the 1st and 3rd respondents here, have relied on the sealed order of the Court of Appeal and argued elsewhere that the doctrine of *stare*
D *decisis* applies so as to bind the High Court, even though no reasoned judgment was given by the Court of Appeal.

[10] We now proceed to narrate our observations, reasoning, conclusions and decision.

E

Observations

[11] First, we examined how it all began. The full background was not provided by counsel for the appellants but had to be gleaned from the submissions for the respondents and the record
F of appeal. The following are our observations thereon.

[12] The appellants' original objection was to a 25 July 2011 direction by the learned Judicial Commissioner to prepare and submit witness statements in preparation for trial. It was objected
G to by the appellants before it was made. After the order was made, there were two concurrent courses of action taken by the appellants: an application to set aside the order and an appeal to the Court of Appeal.

H **[13]** The learned Judicial Commissioner commenced to hear the appellants' application. No doubt informed that an appeal had been lodged, the hearing was adjourned pending the decision of the Court of Appeal. We cannot but observe that it seems such a waste of the process of the court in time and resources that
I such an application was made, particularly that when hearing

commenced it was adjourned to wait for the decision of the Court of Appeal. If the decision of the Court of Appeal was going to be relied upon, we question the need to file the application to set aside the very same order appealed upon.

[14] On 4 January 2012, the Court of Appeal dismissed the appellants' appeal and by order gave liberty to the parties to apply before the High Court.

[15] Not satisfied with the decision of the Court of Appeal, the appellant has applied on 3 February 2012 to the Federal Court for leave to appeal. Now ordinarily if leave is not granted the decision of the Court of Appeal becomes final, and if leave is granted, the decision of the Federal Court upon the appeal becomes final.

[16] The present appeals before us, W-02(IM)-693-03/2012 (No. 74) and W-02(IM)-693-03/2012 (No. 86) are the appellants' respective appeals to this court against the decision of the High Court on 24 February 2012 on encls. 33 and 44 in the same civil suit.

[17] Enclosure 33 was the application filed on 15 August 2011 in the High Court, to review, set aside, vary or suspend the earlier order of the learned Judicial Commissioner, and which had been adjourned on 11 November 2011 pending decision of the Court of Appeal. The application made in encl. 44 in the same civil suit was to reinstate encl. 33. It was heard on 24 February 2012 where the High Court dismissed encl. 33, dismissed the reinstatement of encl. 33, and order was made for the preparation and submission of witness statements, excepting that of expert witnesses and subpoenaed witnesses.

[18] Notwithstanding that the appeals before us are upon the decision on encls. 33 and 44 in the High Court on 24 February 2012, and heard after the decision of the Court of Appeal of 4 January 2012, scant effort was made to present the submissions systematically to address the refusal of each one of the orders sought so that the merits of each could be considered. The main thrust of the submissions remained primarily directed against O. 35A and the order to prepare and submit witness statements, a matter already decided upon in the Court of Appeal on 4 January 2012 and an application for leave to appeal is pending a hearing in the Federal Court.

A **Reasoning And Conclusion**

[19] From the foregoing, it appears the instant appeals are a continuation of a campaign by counsel for the appellants against the order of 25 July 2011 to prepare and submit witness B statements, in which every possible argument were marshalled, advanced in a veritable procession of pots, pans and the kitchen sink, cavorting through the process of the court, unabashedly swaying back and forth with concurrent appeals and applications, constantly keeping the same objection and argument alive.

C

[20] Some of the arguments are also of little or no relevance and merit. For example, the submission that in *Teh Cheng Poh v. PP* [1978] 1 LNS 202 PC, the Privy Council caused an upheaval when it struck down the Essential (Security Cases) (Amendment) Regulations 1975 (made on 1 November 1975) because the Yang D di-Pertuan Agong's emergency legislative powers, given at a time when Parliament was not sitting (on 15 May 1969), had ceased to exist when Parliament next sat (on 20 February 1971) is of no relevance to the issues before this court. We fail to see the relevance. We set out our reasons under broad principles so as E to avoid creating an unintended wrong and discouraging impression by addressing and dealing with each and every argument raised.

[21] In the absence of evidence before the Court of Appeal that F the judge had proceeded in depth to conduct mediation between the parties, and in the process appear to have formed views as to how the matter could be resolved which could affect a fair hearing and a just decision, we can find no fault if the learned Judicial Commissioner, having set down the date for mediation, decided to G proceed to give case management directions to prepare for trial, and to give directions, not merely under but in accordance with O. 35 r. 1 to give evidence-in-chief by way of witness statements, in the form of question and answer, tendered and read at the hearing before the witness is cross-examined on his witness H statement and r. 2 thereof for a copy to be furnished to the other party before the witness statement is tendered and read at the hearing.

[22] Since the submission went no further than that a date set I down for mediation was used for case management which effectively saved counsel from having to come back on another

day, and the learned Judicial Commissioner from having to re-read the file, we find no merit in the submission. Substance of justice overrides form since O. 1A of the Rules of the High Court 1980 requires that in administering any of the rules therein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules therein. No effort was made to show if there is any mandatory requirement such that a date set down for mediation cannot be used for case management. See *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal* [2009] 4 CLJ 329 FC. Clearly the rules are not intended merely to provide fodder for objections to be thrown like banana skins on the path to justice, and at the same time attacked when it does not suit one's purpose.

[23] Both rr. 1 and 2 of O. 35A are qualified by the words "Unless otherwise ordered by the court". It is for the parties to submit why it should or should not be so ordered, to enable the trial judge, before whom are the pleadings and upon whose shoulders rests the direct and primary jurisdiction and responsibility for a fair and just decision, to exercise her judicial discretion as to the qualifications to the general rule in rr. 1 & 2 to be applied in the particular case. Given the use of the word "shall" in rr. 1 & 2, the qualification to the general rule may be granted only upon good reason therefor.

[24] Take for example the evidence of an expert. It is wrong to grant a general exemption exempting their testimony from rr. 1 & 2. If his expert opinion is sought on the basis of the evidence admitted before the court, and he is for that reason allowed to sit in court, then obviously that part of his testimony may be exempted. But even so there can be no possible merit why his testimony as to his background, qualification, expertise and experience relied upon should not be given in a witness statement and furnished to the other party. As to experts giving their opinion and findings on what they inspect, measure and study outside of the trial itself, and submit their findings in a report, there is only rare merit when their report should not be incorporated into and their witness statement prepared and furnished before the trial to the other party.

[25] We find the argument incorporated into submissions for the appellants that the preparation and furnishing of witness statements to be open to abuse by his peers in the legal profession to be frivolous if not scandalous to the legal profession. We cannot share such broadly painted views, and certainly cannot base our decision upon it. No submission should descend to becoming personal. The firmest foundation of justice is getting the facts right. This was an issue dealt with by the basic jurisprudence of civil procedure that:

(i) In pleadings, notice and where necessary particulars, be given of the cause of action and the facts relied upon by a claimant and likewise by the defendant in his defence and counter-claim so that the other party has a fair opportunity to answer it.

(ii) In respect of facts disputed on the pleadings,

(a) disclosure of the nature of the evidence relied upon;

(b) discovery as to documentary and non-oral evidence relied upon; and

(c) interrogatories as to oral evidence,

so that the other party has an opportunity to check and verify the evidence, ensuring that at the end of the day the decision of the court is based upon evidence that are safe to rely upon.

[26] Disclosure, giving the opportunity to the other party to seek discovery and interrogatories to enable that other party to check and verify, and satisfy himself as to the genuineness of the evidence in respect of the disputed facts are tools stronger than any lip, voice or sword in the course of justice. These tools obtain justice, while lip, voice or sword may only seek it. It enables the parties who use these tools to evaluate what is, on a true assessment of the evidence including that disclosed on the disputed fact, likely to be accepted as the correct fact, and therefore decide on an informed basis whether to concede and settle or at least narrow down further the areas of dispute, and thus requiring less trials, trial and even hearing time.

[27] Notice, disclosure, discovery and interrogatories:

(i) eliminate disputes that arise out of lack of one party or the other not having all the evidence;

(ii) place both parties at the end of a properly conducted preparation to have before him all the evidence with the knowledge, what is the evidence that will be before the court if the matter comes to trial;

(iii) promote settlement by negotiation or mediation, and on the balance not settled;

(iv) reduce the number of cases that need to be set down for trial as opposed to need to be set down for hearing; and

(v) eliminate surprise and ambush.

[28] That surprise and ambush could sometimes expose the untruthful is not sufficient justification to do away with the greater wisdom of giving the other party the opportunity to check and verify, thereby satisfying themselves as to what the true facts are. And even if there is no settlement or agreement on the disputed fact, the evidence adduced, having been checked and verified as genuine, or at least where opportunity to do so had been given, assures the court that its decision on that disputed fact is made upon evidence that is safe to rely on. On the other hand, surprise denies the court that assurance. It follows that if a party relies upon surprise to win, either its advocatorial strategy is fundamentally flawed or its case is without merit.

[29] We would venture to observe that while substantive justice depends on getting the facts right, it is always a party's prerogative to lose his case. He may do so by failing to make use of the opportunity to check and verify when it is given and should be denied further delay or adjournment in a trial to do so. Similarly, where a party refuses to disclose, to produce for discovery or to answer interrogatories, in an appropriate case the choice should be kept open to that party by giving an unless order with the appropriate adverse presumption in default. That party can then elect to disclose and produce for inspection or to answer the interrogatories, or to live with the adverse presumption, and the case can proceed forward to a conclusion.

[30] Order 35A came into operation on 1 March 2011 (see s. 1(2) PU(A) 210/2011. Under O. 35A, the trial judge need not order parties to prepare witness statements and to tender the same to the other party. Order 35A itself requires the party calling

A a witness to prepare and to furnish to the other party the witness statements not less than seven days prior to it being tendered and read at the hearing. It is mandatory, subject only to the court ordering otherwise.

B **[31]** We are in agreement with the decision of this court in the earlier appeal when it granted liberty to the parties to apply before the High Court so that the question of specific exemption for each witness may, if necessary, be addressed and enabling the trial judge to exercise his discretion for any exemption, partial or C complete, judicially.

[32] Finding no flaw in principle as to the use of witness statement, we turn to the submissions that the requirement of witness statements under O. 35A is fundamentally flawed in being against the law.

D

[33] Firstly, whether it is flawed as delegation of a judicial function that cannot be delegated. On examination of the authorities cited, we find that except for the general statement of the principle, there is no basis of support on the factual matrix of E this case. There is a distinction between a delegation unauthorised by law, and a delegation that is authorised. In the instant case, there is the specific provision for witness statements to be prepared and furnished to the other party before trial. Case law does not override statutory legislation even if it is subsidiary F legislation. The Rules Committee under s. 17 of the Courts of Judicature Act 1964 is specifically empowered to make rules for the purposes set forth under s. 16 thereof. Section 16(g) authorises the Rules Committee to make rules for regulating the means by which particular facts may be proved, and the mode in G which evidence thereof may be given, in any proceedings or on any application in connection with or at any stage of any proceedings. In our view O. 35A is within that description, and the Rules Committee had not exceeded its powers under the Courts of Judicature Act 1964.

H

[34] Secondly, whether O. 35A breached s. 17(5) of the Courts of Judicature Act 1964 and is therefore null and void. The submission that the Rules had not been tabled before Parliament has not been contradicted. We find that on the face of it there I has been a breach of s. 17(5). We do not find that it should necessarily lead to the conclusion that the rules are null and void for the reason not only s. 17(4) does not require tabling before

Parliament as a precondition to effectiveness but also because it is provided that the Rules Committee determines when the rule comes into force, on the date of publication in the Gazette or such other date as may be specified therein. To digress a little, the plain and obvious language allows Rules Committee if necessary to specify the rule to be backdated to before the date of publication. Nevertheless, the rules had been gazetted. It is public knowledge. It is therefore to Parliament's knowledge also. And if Parliament were so minded, it could at any time disapprove of it. Parliament is not made blind and disenabled to act if the gazetted rules are not laid before it. We therefore conclude that the failure to lay the rules before Parliament was an oversight which however undesirable, does not render the rules null and void.

[35] Thirdly, whether the Rules Committee had breached the provisions of the Evidence Act 1950. The argument is the same as saying that Parliament cannot, in the Courts of Judicature Act 1964, give power to the Rules Committee to make rules for application in a court of law that contradicts an Act of Parliament that Parliament has passed previously. While it is true that subsidiary authority cannot make, by subsidiary legislation law, that overrides an Act of Parliament, there is no provision in the Constitution that restricts the power of Parliament itself, such that it cannot authorise a subsidiary authority to make subsidiary legislation for specific purposes not in accordance with law enacted by Parliament. Thus, even if O. 35A is contrary to the various provisions of the Evidence Act, we hold that it is within the powers of Parliament to authorise the Rules Committee, in the exercise of its powers under s. 16, to make rules that do so.

[36] Examination of the Evidence Act and the rules show that no conflict has occurred. Order 35A provides that the witness statements be tendered and read at the hearing before the witness is cross-examined on his witness statement. It is thus not in evidence if the witness does not appear to tender the witness statement, and to read the same unless the parties agree that the witness statement be taken as read, before he is cross-examined. To hold that the meticulously worded O. 35A breaches the Evidence Act conjures the thought of a vexatious litigant, untrained in the law, arguing that O. 35A denies the party who calls the witness the right to re-examine since O. 35A does not mention re-examination.

[37] The true interpretation of O. 35A is that it only provides that the examination-in-chief of a witness is given by way of a witness statement, and it remains within the fundamental principles of the Evidence Act that the evidence be in question and answer form so as to mirror the form in an oral testimony, and to facilitate cross-examination. It is clearly not intended to be a narrative affidavit as used in affidavit-based proceedings.

[38] The approach to the interpretation of O. 35A, which although a subsidiary legislation is nevertheless law, needs to be addressed. We can do no better than to borrow the words from an address in January 2003 to the ICAC-Interpol Conference by JJ Spigelman entitled "The Rule of Law and Enforcement" and quoted by the Hon. Justice Brian J Preston, Chief Judge of the Land and Environment Court of New South Wales in a paper in 2006 entitled "Making law work: Improving environmental compliance and enforcement in Australia.":

> The making of laws is not an end in itself. Laws are to be complied with. If laws are not complied with, the rule of law breaks down …

[39] We conclude with the observation that the interpretation and application of O. 35A is a question of mindset. It should start with compliance, and then to explain which parts of a witness's testimony cannot, in the particular case, be given in a witness statement. It maintains the proper perspective. It places the reasons in the best possible light for consideration in the judicial exercise of the court's discretion. The issue in this case, pursued inexhaustibly and in the manner it has been conducted, has been pursued beyond the bounds of necessity. The submission, at para. 2 of the summary of submissions, that "Her Ladyship had clearly intended that oral evidence during examination-in-chief of certain witnesses be excluded" capping the submissions for appellants show the submissions to be a hyperbolic construct. We find no basis for the accusation. The trial had not begun and the learned Judicial Commissioner had not excluded oral testimony. We find the appeals to be wholly without merit.

Decision

[40] We dismiss the appeals with costs.